



Citation: *AK v Canada Employment Insurance Commission*, 2023 SST 2004

## **Social Security Tribunal of Canada General Division – Employment Insurance Section**

# **Decision**

**Appellant:** A. K.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (581421) dated March 23, 2023 (issued by Service Canada)

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**Tribunal member:** Suzanne Graves

**Type of hearing:** In person

**Hearing date:** August 24, 2023

**Hearing participant:** Appellant

**Decision date:** November 30, 2023

**File number:** GE-23-1404

## Decision

[1] The appeal is dismissed.

[2] The Appellant hasn't shown that she had good cause for the delay throughout the entire period of delay in applying for benefits, from October 1, 2017, to November 3, 2022. In other words, the Appellant hasn't given an explanation that the law accepts. This means the Appellant's application can't be treated as though it was made earlier.<sup>1</sup>

## Overview

[3] The Appellant applied for Employment Insurance (EI) sickness benefits on November 3, 2022. She asks that her application be treated as though it was made earlier, on October 1, 2017. The Canada Employment Insurance Commission (Commission) has already refused this request.

[4] I have to decide whether the Appellant has proved that she had good cause for not applying for benefits earlier.

[5] The Commission argues that the Appellant didn't have good cause because she waited five years to apply for benefits. It says that she didn't contact her employer or the Commission to confirm her rights and obligations.

[6] The Appellant disagrees and argues she made several attempts to contact the Commission about her 2017 claim but couldn't get the information she needed. She thought that a paper benefits application would be sent to her by mail, because this was the process she had followed in an earlier claim for benefits.

[7] She says there were significant communication barriers between herself and the Commission, as she is Deaf, and Commission processes didn't then allow her to use sign language. As English isn't her first language, she also couldn't visit a Service Canada office and exchange written notes to ask about her benefits claim.

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<sup>1</sup> Section 10(4) of the *Employment Insurance Act* (EI Act) uses the term "initial claim" when talking about an application.

## **I will accept documents sent in after the hearing**

[8] At the hearing, the Appellant asked for time to send in new documents to show her attempts to contact Service Canada about her claim between 2017 and 2022. The Appellant later wrote to the Tribunal to ask for additional time due to processing delays by a third party, Video Relay Services (VRS).

[9] I allowed extra time for the Appellant to obtain the records, and she sent in a document showing the dates of her VRS communications with the Commission in 2021 and 2022. I accepted the documents as they are relevant to the issue before the Tribunal. The Tribunal sent the records to the Commission and allowed it time to respond.

[10] I also asked the Commission to provide records of all communication between the Appellant and the Commission between 2017 and 2022. The Commission sent in its records. I sent those documents to the Appellant and allowed her time to reply.

## **Issue**

[11] Can the Appellant's application for benefits be treated as though it was made on October 1, 2017? This is called antedating (or, backdating) the application.

## **Analysis**

[12] To get your application for benefits antedated, you have to prove these two things:<sup>2</sup>

- a) You had good cause for the delay during the entire period of the delay. In other words, you have an explanation that the law accepts.
- b) You qualified for benefits on the earlier day (that is, the day you want your application antedated to).

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<sup>2</sup> See section 10(4) of the EI Act.

[13] The main arguments in this case are about whether the Appellant had good cause. So, I will start with that.

[14] To show good cause, the Appellant has to prove that she acted as a reasonable and prudent person would have acted in similar circumstances.<sup>3</sup> In other words, she has to show that she acted reasonably and carefully just as anyone else would have if they were in a similar situation.

[15] The Appellant has to show that she acted this way for the entire period of the delay.<sup>4</sup> That period is from the day she wants her application antedated to until the day she actually applied. So, for the Appellant, the period of the delay is from October 1, 2017, to November 3, 2022.

[16] The Appellant also has to show that she took reasonably prompt steps to understand her entitlement to benefits and obligations under the law.<sup>5</sup> This means that the Appellant must show that she tried to learn about her rights and responsibilities as soon as possible and as best she could.

[17] If the Appellant didn't take these steps, then she must show that there were exceptional circumstances that explain why she didn't do so.<sup>6</sup>

[18] The Appellant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she had good cause for the delay.

### **The Commission's argument**

[19] The Commission says the Appellant hasn't shown good cause for the delay. It argues that she didn't act like a "reasonable person" would have done to verify her rights and obligations under the *Employment Insurance Act* (EI Act). It says that the

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<sup>3</sup> See *Canada (Attorney General) v Burke*, 2012 FCA 139.

<sup>4</sup> See *Canada (Attorney General) v Burke*, 2012 FCA 139.

<sup>5</sup> See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.

<sup>6</sup> See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.

Appellant didn't contact her employer or the Commission about her claim until five years after she left her job.

### **The Appellant's argument**

[20] The Appellant argues that she had good cause for the delay. She testified that she spoke with her employer and made several efforts to try to discuss her EI claim with the Commission between 2017 and 2022.

[21] The Appellant testified that she is Deaf. She also does not speak or read English. For her to understand a written document, it must be translated from written English into American Sign Language (ASL).

[22] The Appellant explained that she had only previously applied once for EI several years earlier in 2007, and it was made on a paper claim form. At that time, there had been nothing for her to submit online.

[23] So, when she received her record of employment (ROE) in 2017, she believed it would be sent directly to the Commission, and she would get a paper EI application form to complete. Her employer's human resources department told her they had sent the information to the Commission, so she reasonably waited for her EI claim form to arrive in the mail.

[24] The Appellant also consulted with her hearing services counsellor in 2017. Her counsellor advised her that EI is often very busy, and she should wait to hear back. But she never received a claim form to complete.

[25] The Appellant says the Commission made it almost impossible for her to communicate with its officers. She says that, until 2021, the government didn't allow claimants to use VRS as it took the position that the service wasn't confidential. So, she was required to use the Teletypewriter (TTY) system.

[26] Also, Service Canada wouldn't provide a sign-language interpreter in their offices but said she could exchange written notes. Since the Appellant doesn't speak or write

English, neither TTY nor exchanging notes at a Service Canada office were options for her. As a result, she says that she didn't have access to information that other claimants would normally have.

[27] During part of the period of delay, the Appellant also says that her regular hearing services counsellor was away, and a temporary counsellor was assigned. So she also didn't have access to proper support at all times.

[28] The Appellant testified that she was finally able to interact with Service Canada about a new sickness benefits claim in 2021. At that time she came to understand that EI applications are now made online. She made a different claim in July 2021, and received a code for claiming benefits. But she never got a code to claim benefits for the time she was off work in 2017.

[29] By 2021, the Appellant says she thought the opportunity to make her 2017 claim had passed. But her accountant encouraged her to make a claim, because they said she was within the seven-year cut off period. So, starting in July 2021, she contacted Service Canada about her 2017 claim.

[30] But the Appellant argues the Commission didn't give her enough direction to know how make the 2017 claim. She testified that each time she called Service Canada, officers gave her different advice. One officer advised her to try using the same access code as she had received in 2021. But this didn't work.

[31] The Appellant also argues that the Commission's later record of their conversation is false when it reports she told an officer she didn't contact Service Canada.<sup>7</sup> She testified that ASL interpreters work on rotation, so sometimes an interpreter is switched out in the middle of their VRS conversation. This sometimes led to miscommunication between herself and the Commission. Her hearing services counselor also contacted the Commission but did not receive a call back.

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<sup>7</sup> The Commission's notes of its conversation with the Appellant on March 22, 2023, are at GD3-23.

[32] The Appellant argues she acted reasonably during the delay, and her circumstances were exceptional because she couldn't communicate properly with the Commission, and because her permanent hearing services counsellor was not always available.

[33] The Appellant also says she is experiencing difficult financial circumstances. She has tried to get emergency loans to help with her financial needs, but her attempts have been unsuccessful. She also has a number of medical issues which have made it difficult to find work.

### **So, did the Appellant have good cause for the delay in making her application?**

[34] I reviewed the evidence and documents provided by the Appellant, including her forthright testimony and the VRS records showing her contacts with the Commission about her 2017 claim.

[35] I accept the Appellant's evidence that she wasn't aware she had to make an online claim in 2017. I also accept her testimony that it was extremely difficult to communicate with the Commission because of significant barriers due to lack of access to video relay, or ASL interpretation in Service Canada offices until 2021.

[36] I find that the Commission did not provide the Appellant with access to suitable communication methods with its officers until she was able to use video relay in 2021.

[37] I have not placed any weight on the Commission's notes of her later communication with its officers. I accept the Appellant's testimony, supported by the communication records she filed, that she did in fact make several attempts to follow up on her 2017 claim in 2021, as soon as she had a means to communicate through VRS.

[38] I agree with the Commission's argument that ignorance of the law does not excuse a delay. But I find in the Appellant's circumstances, she acted reasonably for the first part of the delay until December 13, 2021, given the communication barriers between herself and the Commission.

[39] However, a claimant must show that they had good cause for the *entire* period of the delay. The Appellant testified that she was aware of the online EI claim process in mid 2021 and was able to make a different EI claim at that time.

[40] The VRS call record sent in by the Appellant shows she contacted the Commission six times between November 3, 2021, and December 13, 2021, through VRS to discuss her 2017 claim.<sup>8</sup> But she then waited another ten months before contacting her hearing services counselor on October 19, 2022, to follow up on her claim.<sup>9</sup> She then contacted the Commission again on October 31, 2022, three days before submitting her online claim on November 3, 2022.

[41] I find that the Appellant has unfortunately not shown that she had good cause for the last part of the delay from December 13, 2021, to October 31, 2022. During that ten-month period, she had access to communication methods with the Commission, and was aware of the online EI claim process.

[42] So, I find that the Appellant unfortunately hasn't proved that she had good cause for the **entire period of delay** in applying for benefits. She also didn't provide any evidence of exceptional circumstances that would have prevented her from making the claim during the last part of the delay between December 13, 2021, and October 31, 2022.

[43] I don't need to consider whether the Appellant qualified for benefits on the earlier day. If the Appellant doesn't have good cause, her application can't be treated as though it was made earlier.

[44] I have compassion for the Appellant's difficult personal circumstances. But I am required to follow the rules set out in the EI Act and have no ability to make exceptions for cases of financial hardship, even in the interest of compassion.<sup>10</sup>

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<sup>8</sup> See GD16-2.

<sup>9</sup> The Appellant filed a copy of an email from her hearing services counselor showing this date (GD9-1).

<sup>10</sup> In *Canada (Attorney General) v Lévesque*, 2001 FCA 304, the Federal Court of Appeal held that the legislation has to be followed, regardless of the personal circumstances of the appellant (see also *Pannu v Canada (Attorney General)*, 2004 FCA 90).



## **Conclusion**

[45] The Appellant hasn't proved that she had good cause for the delay in applying for benefits throughout the entire period of the delay.

[46] The law requires me to dismiss the appeal.

Suzanne Graves

Member, General Division – Employment Insurance Section